

**CHARLES R. WEBB**  
Claimant

**HI-LO INDUSTRIES**  
Respondent

**FIREMAN'S FUND INSURANCE COMPANY**  
**LUMBERMEN'S CASUALTY INS. COMPANY**  
Insurance Carriers

## ORDER

## APPEARANCES

## RECORD AND STIPULATIONS

## ISSUES

<sup>1</sup> Respondent and the two carriers are united in their opposition to the request by claimant's counsel for post-award attorney's fees. Accordingly, respondent and both carriers will be referred to in this Order collectively as "respondent."

Claimant's counsel argues a previous order by Judge Moore awarding post-award attorney fees was limited to fees incurred in claimant's request for psychological treatment and did not include fees for the attorney's other efforts, dating back to 2003, to obtain post-award treatment. Claimant's counsel contends the fees sought in the current request have not been previously submitted and the Act contains no time limitation for submitting a claim for post-award fees. Counsel also maintains the current affidavit and time itemization are in the same format as the previously submitted itemization, which formed the basis for the ALJ's previous award of fees. Claimant's attorney urges the Board to reverse the ALJ's decision and grant him reasonable attorney fees. Alternatively, should the Board determine the current time entries are inadequate, claimant's counsel requests leave to submit a more detailed itemization.

Respondent argues the request for attorney fees includes time entries dating back over a decade and should be denied as untimely. Respondent also advances the position the entries do not adequately explain the tasks involved or what specific benefit was being sought for each task. Respondent requests the Board affirm the ALJ's decision.

The sole issue is: should claimant's counsel be awarded post-award attorney fees?

#### **FINDINGS OF FACT**

Claimant sustained his work injury on February 17, 1999. The claim was settled on an agreed open award on December 3, 2002. There has been much post-award activity, including applications for review and modification, post-award preliminary hearings, and medical and psychological treatment. The request for psychological treatment was denied by the ALJ and that decision was affirmed by the Board on May 6, 2014.

On November 20, 2014, claimant's attorney filed a Motion for Post Award Attorney's Fees, attached to which was an itemization of time and counsel's affidavit. The itemization contained entries dating back to 2003. In the affidavit, claimant's counsel swore the itemization of time reflected services rendered by him in pursuing post-award medical treatment. In the motion, claimant's counsel requested attorney fees totaling \$14,000 (70 hours at \$200 per hour).<sup>2</sup>

A hearing on the motion was held on February 4, 2015. Without objection, the ALJ reviewed and considered the motion, affidavit and time itemization, and heard comments by counsel for the parties. The ALJ stated at the hearing:

THE COURT: Well, I'm going to deny the application for post award attorney fees at this time. These requests are stale. They date back 12 years. I

---

<sup>2</sup> Claimant's counsel subsequently filed an amended affidavit and time itemization requesting 64.75 hours at \$200 per hour, totaling \$12,950.

have no way of knowing what the context of a January 31, 2003, letter from attorney and updated medical relates to. Or June 23, 2003, letter to attorney referenced, whether that was all ministerial, whether there was any actual litigation that ensued.

The affidavit is insufficient to support a claim for post award attorney fees at this time. I did endeavor to insure that Mr. Smith was compensated for the services of actually litigating a post ward medical application rather than just ministerial services. Even though he was unsuccessful, I did find his application had merit but I'm not going to go back and after the fact and grant him additional attorney fees reaching back 12 years in time based upon the affidavit submitted to the Court.

The application for post award attorney fees is denied.<sup>3</sup>

As noted by the ALJ, there was a previous request for post-award attorney fees relating to representation by claimant's counsel in his efforts to obtain authorization of psychological treatment. In connection with such previous fee request, the ALJ entered an order dated January 2, 2014, that directed claimant's counsel to "file with the court, and serve upon opposing counsel, an affidavit of time expended and expenses incurred in prosecuting the instant application for Post-Award Medical."<sup>4</sup>

On January 13, 2014, claimant's counsel filed an affidavit and itemization of time and expenses, which was in substantially the same form as the itemization subsequently filed by claimant's counsel on November 20, 2014. Claimant's attorney requested \$6,350 (31.75 hours at \$200 per hour) in connection with pursuing claimant's request for psychological treatment. The motion was heard on August 6, 2014. On August 7, 2014, the ALJ ordered respondent to pay claimant's counsel attorney fees in the amount of \$4,762.50 (31.75 hours at \$150 per hour). Board review of the August 7, 2014, award of attorney fees was not requested.

#### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 1998 Supp. 44-536(g) provides:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on

---

<sup>3</sup> Motion-Attorney Fees Trans. (Feb. 4, 2015) at 7-8.

<sup>4</sup> ALJ Post-Award Med. Award (Jan. 2, 2014) at 7.

the basis of the reasonable and customary charges in the locality for such services and not in a contingent fee basis. If the services rendered under this subsection by an attorney result in a additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

The Board reverses the ALJ's order and remands the claim for further proceedings.

The ALJ found the itemization of time submitted by claimant's counsel was stale, due to the age of many of the time entries, and was insufficiently specific to allow the court to determine to what the time entries concerned. While the Board agrees with the ALJ's observations about the inadequate specificity of the time entries and their remote and far-flung nature, the Board finds the most appropriate method to remedy the situation is not to deny or allow the request for post-award fees in its entirety, but rather to remand<sup>5</sup> the claim for further proceedings. The Board's rationale is:

1. The Kansas Workers Compensation Act contains no provision requiring denial, in its entirety, a claim for post-award attorney fees based on a finding that some or any of the time entries submitted are stale or "out of time." While such time entries must be adequately specific to allow each entry to be properly evaluated, there is no provision mandating the denial of such a request in *toto* as a consequence. In *Bergstrom*<sup>6</sup> the Kansas Supreme Court stated:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

In *Acosta*,<sup>7</sup> the Kansas Supreme Court held:

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency

---

<sup>5</sup> The Board has authority to remand a claim pursuant to K.S.A. 1998 Supp. 44-551(b)(1).

<sup>6</sup> *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

<sup>7</sup> *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).

must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.” *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379 (1998). Further, the Workers Compensation Act is substantial, complete, and exclusive, covering every phase of the right to compensation and of the procedure for obtaining it. See *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

2. The undisputed evidence,<sup>8</sup> considered by the ALJ without objection by respondent, establishes: a) claimant’s counsel provided post-award services in seeking medical treatment for his client; b) the itemization of time accurately reflects those services; c) attorney fees for such services have not been paid by respondent; and d) the time itemization does not include entries related to claimant’s application for review and modification or his efforts to obtain psychological treatment, only his claim for post award fees in connection with, as stated in the ALJ’s order, “the instant application.” The itemization of time submitted by claimant’s counsel in support of his current request is in the same format as the previous request, on which the ALJ based his previous award of post award fees. The ALJ was not bound to accept the current request and itemization, although subsequent submission of other time entries in the same format would suggest the same or similar result.

3. In *Hatfield*,<sup>9</sup> the Court held that “[t]he overriding purpose of the Workers Compensation Act is to secure prompt payment to injured employees of the benefits provided for under its terms.” The purpose of the attorney fee statute is to encourage attorneys to represent claimants in circumstances where there is no additional award of disability compensation from which a fee could be taken.<sup>10</sup> The general purpose of allowing attorney fees in these situations includes the policy reasons that: a) attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved; and b) statutes allowing an award of attorney fees are not passed to benefit the attorney, but are passed to enable litigants to obtain competent counsel.<sup>11</sup>

The Board finds that the ALJ’s order in this claim, in which he denied attorney fees for over a decade’s worth of work, does not further the purposes of K.S.A. 1998 Supp. 44-536(g).

---

<sup>8</sup> Uncontroverted evidence which is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive. *Demars v. Rickel Manufacturing Corp.*, 223 Kan. 374, 573 P. 2d 1036 (1978).

<sup>9</sup> *Hatfield v. Wal-Mart Stores, Inc.*, 14 Kan. App. 2d 193, 196-197, 786 P.2d 618 (1990)

<sup>10</sup> *Robinson v. Golden Plains Health Care*, No. 239,485, 2004 WL 2522324 (Kan. WCAB Oct. 25, 2004).

<sup>11</sup> *Hatfield*, 14 Kan. App. 2d at 199.

4. Although under K.S.A. 44-536(g), the ALJ may have discretion whether or not to award fees in some post-award proceedings, the Act contains no provision requiring attorneys for claimants to work for free.

5. Some time entries are clearly verifiable from the ALJ's file.

6. Respondent does not challenge specific entries in the itemization, nor does respondent contend claimant's counsel should not be paid for his post award efforts to seek medical benefits for claimant.

On remand, if claimant's counsel wishes to further pursue the fees at issue in this Order, he shall resubmit to the ALJ a new motion, affidavit and time itemization as outlined below, all of which the Board finds reasonable and customary in the locality for such services:

1. The minimum allowable time increment is .10, not .25.

2. The time entries in the itemization must reasonably describe the purpose and general subject matter of each activity with some degree of detail, for the purpose of allowing the finder of fact a basis to determine to what each entry relates. Obviously, the precise content of privileged communications with the claimant shall not be disclosed.

3. All parties shall be provided a reasonable opportunity to be heard and present evidence regarding the post-award attorney fees request. The specifics of such opportunity shall be for the ALJ to determine, subject to review by the Board.

4. Reasonable and customary hourly rates were found by the Board to be \$125 in 2002, \$150 in 2004 and \$175 in 2015.<sup>12</sup>

5. The attorney work contemplated by the statute must be directed towards the securing of additional benefits for claimant. Time billed for purely clerical or "ministerial services" would not be an appropriate billing, as it would be contrary to public policy to add the burden of attorney fees to a respondent who has complied with all the provisions of an award.<sup>13</sup> Accordingly, all entries in the itemization, if any, that represent purely clerical or ministerial services shall be omitted.

The Board further notes as follows:

---

<sup>12</sup> *Bradley v. Havens Steel Company*, No. 137,873, 2015 WL 996907 (Kan. WCAB Feb. 19, 2015).

<sup>13</sup> *May v. University of Kansas*, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

1. The better practice is to submit requests for post-award attorney fees within a reasonable time and at appropriate intervals following the provision of such services.

2. The Board specifically does not address whether delayed submission of post-award attorney fees requests can result in the deprivation of a party's reasonable opportunity to be heard and present evidence regarding such a request, and the consequences of such a delay.

3. This Order does not address the appropriate rates applicable to work of paralegals or legal assistants.

4. This decision is not a final order.

5. The Board does not retain jurisdiction of this claim or any part thereof.

**CONCLUSIONS**

The Board finds the ALJ's ruling on the request of claimant's counsel for post-award attorney fees is reversed and remanded for further proceedings consistent with this Order.

**AWARD**

**WHEREFORE**, the Board finds the Post-Award Medical Hearing Order of Administrative Law Judge Bruce E. Moore dated February 5, 2015, is reversed and remanded to the ALJ for further proceedings consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2015.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant  
pat@pcs-law.com  
maddie@pcs-law.com

Leslie A. Klaassen, Attorney for Respondent and Fireman's Fund Insurance Co.  
leslie.klaassen@gmail.com

J. Scott Gordon, Attorney for Respondent and Lumbermen's Casualty Insurance Co.  
sgordon@mgbp-law.com  
vfuller@mgbp-law.com

Honorable Bruce E. Moore, Administrative Law Judge